

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON BUSINESS AND LABOR**

**Call to Order:** By **CHAIRMAN JOE MCKENNEY**, on March 14, 2001 at 8:00 A.M., in Room 172 Capitol.

#### **ROLL CALL**

##### **Members Present:**

Rep. Joe McKenney, Chairman (R)  
Rep. Rod Bitney, Vice Chairman (R)  
Rep. Gary Matthews, Vice Chairman (D)  
Rep. Sylvia Bookout-Reinicke (R)  
Rep. Roy Brown (R)  
Rep. Dave Gallik (D)  
Rep. Kathleen Galvin-Halcro (D)  
Rep. Dennis Himmelberger (R)  
Rep. Jim Keane (D)  
Rep. Rick Laible (R)  
Rep. Bob Lawson (R)  
Rep. John Musgrove (D)  
Rep. William Price (R)  
Rep. Allen Rome (R)  
Rep. Donald Steinbeisser (R)  
Rep. Brett Tramelli (D)  
Rep. James Whitaker (R)

**Members Excused:** Rep. Nancy Fritz (D)  
Rep. Carol C. Juneau (D)

**Members Absent:** None.

**Staff Present:** Gordon Higgins, Legislative Branch  
Jane Nofsinger, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

##### **Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB314, SB323, SB428, 3/9/2001  
Executive Action: None

**HEARING ON SB314**

**Sponsor:** SEN. STEVE DOHERTY, SD24, GREAT FALLS

**Proponents:** Dave Pauli, Humane Societies, six western states  
Ganay Johnson, Montana Animal Care Assn.  
David Swanson, Flathead County Animal Care  
Linda Hughes, Montana Animal Care Assn.  
Rick Helms, Great Falls Vet Service  
Tracey Hurd, Humane Society Cascade County

**Opponents:** Ken Brown, Board of Veterinary Medicine  
Rick Scheer, Great Falls Veterinarian  
Stuart Doggett, Montana Veterinary Care Assn.

**Opening Statement by Sponsor:** SEN. STEVE DOHERTY, SD24, GREAT FALLS, told the committee this was a "cat and dog bill" for real. He said the bill sought a humane means for animals which need to be euthanized. He said the bill gives the power to the Board of Veterinary Medicine to set up drugs and methods for fee schedules to certain agencies to take this action.

**Proponents' Testimony:**

**Mr. Pauli** said there is a need for this method to allow lethal injection. He explained that training and uniform standards are needed. He said the direct licensing of the shelter could be optional.

**Mr. Johnson** said Livingston County runs its own shelter and has two technicians. Animals are given lethal injections there after being held for two weeks, he said. However, he noted there are no standards across the state and some shelters cannot get drugs for lethal injections and they must resort to the use of a gas chamber. "We are in the business of saving and placing animals, but in some cases euthanasia is the only possible solution," he said. This bill will regulate the standards and training courses to those who administer euthanasia, he said.

**Mr. Swanson** said among his duties were the rescues of animals. He said after they had cared for the animals for 72 hours, they were required to kill them. He asked what bigger conflict can society put on an individual. He explained the term "euthanasia" means "good death." He testified that a gas chamber death is psychologically hard on an animal, and on the person who is required to observe the animal until its death. He explained the animal howls, has spasms and bowel movements. He stated the injection method is the proper way to euthanize and the gas method should not be used any longer. He said the term "put to

sleep is what the injection is like, and this is easiest on the person and the animal. He said use of this method would also reduce personnel turnover and psychological problems in workers.

**Ms. Hughes** said humane societies are to encourage humane treatment, but also are for animal control. She said there are not enough homes to take all of the homeless animals, and the societies are responsible for giving these animals a good death. She said they have two staff members who have gone through certification training and skills course. She added that through the administration of lethal injection stress on the animal is virtually eliminated, and their death is calm and peaceful.

**Mr. Helms** said lethal injection insures kind and timely euthanasia when administered with the standard requirements. He said because there are so many deaths necessary it is difficult for veterinarians to handle them all. He said the Board of Veterinary Medicine and the legislature agreed on the need to not put controlled substances in the hands of lay people. He said this bill requires certification of workers who administer these.

**Ms. Hurd** said in regard to the concern for safety the gas chamber presented a danger to workers, and that there had been reported deaths in the nation.

**Opponents' Testimony:**

**Mr. Brown** said he had been appointed by the **Governor** to act for animal protection and he was against this bill. He felt the bill would allow non-trained personnel to have access to schedule 2 controlled substances. He said there was a drug abuse potential. He said vets have documented evidence of dogs receiving cat medicine and vice versa in workplace errors. He felt the bill was not in the best interest of the animals. He said it would be a great responsibility for his board and they did not have adequate personnel. **EXHIBIT (buh58a01)**

**Mr. Spencer** presented amendments. **EXHIBIT (buh58a02)**

***{Tape : 1; Side : B; Approx. Time Counter : 0}***

**Mr. Scheer** said 2-7 days is not adequate training for controlled substances. He said it is not always necessary for a cat or a dog which had been hit by a car to be euthanized when good nursing care might restore them. He said these situations require medical judgments to be made by trained veterinarians. He said this bill would further divide veterinarians and shelters. He said these narcotics should not be put in the hands of people with no experience. He noted that Cascade County allowed convicted people

to do community service at the shelters. He said the vast majority of veterinarians are opposed. He said three major boards oppose it, and asked why give untrained people this access. He said there are no certified veterinarian technicians in the state of Montana at this time. "This bill is scary," he concluded.

**{Tape : 1; Side : B; Approx. Time Counter : 8.4}**

**Mr. Doggett** opposed the bill on behalf of his members. He said they were concerned about the fact the act modified the practice of veterinary medicine. The specific concerns were: 1) the enforcement, 2) the non-qualified technician handling of the drugs, 3) the inadequate staff at the Board of Veterinary Medicine, and 4) the employee turnover at the humane societies.

**{Tape : 1; Side : B; Approx. Time Counter : 11}**

**Questions from Committee Members and Responses:**

**REP. LAIBLE** asked **Mr. Pauli** how he felt about the amendment, the controlled substances and the decision to euthanize the animal. He answered that the amendment was acceptable. He said the discussion about the controlled substance sounded like they were talking about a new drug. He said they had been using lethal injections in Billings for 20 years under the sanction of a veterinarian. He said not all animals hit by cars can be saved and most shelters do not have the resources to be able to provide extended care for these animals. He said they always try to hold animals longer if they believe the animal has an owner. To determine this they use several tests, one of which is the temperament test. He explained that in June, July and August they receive 70-80 animals a day. These are screened for color and desirability. **REP. LAIBLE** asked him about euthanasia procedures. **Mr. Pauli** responded that he knew of three shelters in Montana that performed euthanasia by lethal gunshot. He added that some vets will refuse to euthanize a healthy animal.

**REP. GALVIN-HALCRO** asked **SEN. DOHERTY** if he could alleviate some doubts about the Class 2 drugs being used for euthanasia. **SEN. DOHERTY** said the Board of Veterinary Medicine will set which drugs can be used. He said he resented the implication that the bill would allow PCP to be put in animal shelters. He said sodium pentobarbital which would be used was not a recreational drug. He added they have adopted every amendment the board has presented.

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**REP. STEINBEISSER** asked how the bill would affect farmers and ranchers. **SEN. DOHERTY** said the ranchers need the freedom to do

what they need to do, and this bill will not affect them in any way.

**REP. BOOKOUT-REINICKE** asked **Mr. Pauli** if he felt the Board of Veterinary Medicine was being cooperative. **Mr. Pauli** said he had thought so until the last two hearings. He had expected stronger support.

**REP. BOOKOUT-REINICKE** asked **Dr. Brown** if the bill died in committee would he accept the challenge to help the shelters with this problem. She said she believed it sounded like a "turf war." **Dr. Brown** said there is not a vet in Montana who wants to euthanize another animal. He said people have put their licenses on the line to help the shelters with little reward because they believe it is the right thing to do. He said the "turf war" is fairly geographical to Great Falls.

**VICE-CHAIRMAN BITNEY** asked **Dr. Scheer** how safe it was to administer sodium pentobarbital versus the gas chamber. **Dr. Scheer** said there is a low incidence of injury because none has occurred in Montana, and added there is more of a problem in the potential for abuse. **VICE-CHAIRMAN BITNEY** asked him to address the humane aspects of lethal drugs, gas, or gunshot. **Dr. Scheer** said all are considered humane. He noted he had never used a gas chamber himself, and he said the American Veterinary Assn. considers a gunshot acceptable. **VICE-CHAIRMAN BITNEY** asked if he considered it safe for a lay person to administer a lethal injection. **Dr. Scheer** said, in his opinion, it was not.

**VICE-CHAIRMAN BITNEY** asked **Ms. Hurd** if she had stated there had been three human deaths due to gas chamber euthanasia. She replied that was correct in the nation. She said the CO2 chamber operator died in Tennessee, Missouri and one other state.

**Closing by Sponsor:**

**SEN. DOHERTY** said the bill want to create trained lay people with proper training. "Legislation is not created on a whim," he said. He noted the Board of Pharmacy does not oppose this bill. He said some vets oppose it, and some support it. He said the bill has safeguards built in, it was brought well in advance, and has been discussed for several years. He concluded it was a reasonable solution to a problem "we wish we didn't have."

**{Tape : 2; Side : A; Approx. Time Counter : 23.1}**

**HEARING ON SB428**

**Sponsor:** SEN. DAN HARRINGTON, SD19, BUTTE

**Proponents:** Don Judge, MT AFL-CIO

Terry Minnow, MEA / MFT

Gene Fenderson, MT Joint Heavy Highway Equipment

**Opponents:** None

**Opening Statement by Sponsor:**

SEN. DAN HARRINGTON, SD19, BUTTE, said this was a bill about unemployment. The act "increases the unemployment insurance maximum weekly benefit amount from 60 percent to 63 percent of the average weekly wage," he noted. He said this brings the amount to about 63% of the national average. He explained the amount in the bill was originally 67% and the current Montana amount was 60% of the national average. He said this would amount to a \$9-10 per week to unemployed people, making the maximum benefit paid per week to \$278. He said this compared to \$358 in Colorado, \$296 in Idaho, \$291 in North Dakota, and \$324 in South Dakota. He said only two states paid less than Montana.

**Proponents' Testimony:**

Mr. Judge said the bill raises the maximum amount unemployed workers can receive.

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He noted that as of last week there were 2000 dislocated workers in Montana, and 81 more this week.

Mr. Minnow said this was an important bill to their members. She said that 500 teachers might lose their jobs if they were not funded. She thought there might also could be some layoffs in the universities.

Mr. Fenderson said many of his members were skilled workers. He told the committee the workers were migrating westward to Washington and Oregon due to the variance in wages. He said they could earn \$5-8 more an hour in Spokane, WA than in Circle, MT. He noted they looked at the unemployment because they can draw \$437 in Washington. He said this is important because their work is seasonal.

**Opponents' Testimony:** None

**Informational Witness:**

Mr. Kevin Braun said he was available for questions.

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**Questions from Committee Members and Responses:**

**REP. PRICE** asked **SEN. HARRINGTON** about the fiscal note. He replied it had been cut in half. He said it would be no problem even if it had gone up to 6%, because there was \$271 million in the fund.

**REP. WHITAKER** asked **Ms. Minnow** if there had been an enrollment drop in the schools. She replied yes the student population had decreased by 6700 in the last 6 years.

**REP. BROWN** said to **Mr. Braun** he understood **SEN. HARRINGTON** to say there was \$271 million in the trust fund, and **REP. BROWN** thought the figure was \$171 million. **Mr. Braun** said the fund had \$172 million in December and \$165 million in January. He explained the fund fluctuates and is lowered in the fourth quarter when there is a high rate of unemployment. If the fund drops to a certain point by October, the rates for Schedule 2 are triggered and the higher rates go into effect on January 1.

**Closing by Sponsor:**

**SEN. HARRINGTON** apologized for the incorrect figure of \$271 million, but he noted that the fund does change. He told the committee that even though this was a slight increase, it would send out a good signal to the workers. He said no increase would be a bad signal. He said if it passed out of committee he hoped **REP. GALVIN-HALCRO** would carry it in the House.

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**HEARING ON SB323**

**Sponsor:** **SEN. WALTER MCNUTT, SD50, SIDNEY**

**Proponents:** John Alke, Montana Defense Trial Lawyers  
Web Brown, Montana Chamber of Commerce  
Larry Jones, Liberty NW  
Riley Johnson, NFIB  
Derek Brown, Montana Building Industry &  
Brown Construction  
Tom Bradford, Montana Roofing Contractors  
Bradford Roofing  
Dexter Thiel, Thiel Bros. Roofing

**Montana Roofing Contractors**

Kathy Griffith, ASME , Butte  
Leland Griffin, Montana Refinery, Great Falls  
Linda Reed, Quest  
James Mockler, Coal Council  
Patrick Montalban, NO. Montana Oil & Gas Assn.  
Jacqueline Lenmark, AIA  
John Metropolous, NAII  
Gail Abercrombie, Montana Petroleum Assn.  
Charles Brooks, Billings Chamber of Commerce  
Brad Griffin, Montana Retail Merchants Assn.  
Steve Turkowicz, Montana Auto Dealers Assn.  
Patrick Heffernan, Montana Logging Assn.  
Cary Hegrebert, Montana Wood Products Assn.  
Nancy Schlepp, Montana Farm Bureau  
Nancy Butler, State Fund  
Ray Barnicot, Montana Assn. of Counties  
Mary Ellen, Cenex  
Christy Blazer, Montana Assn. of Beer and Wine  
Wholesalers  
Spook Stang, Montana Motor Carriers  
George Wood, Montana Self-Insurers Assn.  
Aidan Myhre, D.A.Davidson

**Opponents:** Eric Thusen, attorney, Helena  
Don Judge, MT AFL-CIO  
Ed Logan, self  
Al Smith, Montana Trial Lawyers

**Opening Statement by Sponsor:**

**SEN. WALTER MCNUTT, SD50, SIDNEY,** said "the bill amends the exclusive remedy provision in the WCA to provide an injured employee with a cause of action for damages against an employee or fellow employee who causes intentional injury." **SEN. MCNUTT** said this bill is not about workmen's compensation benefits. He said it is about when a worker can sue another employee and still have workmen's compensation benefits. He said the bill was being brought because of a recent Supreme Court decision which said unless the acts are intentional they are not subject to litigation. In the 2000 decision, the Supreme Court revisited the standard used for determining whether an employer's act or omission was protected under the exclusive remedy. The Court held that it would be actual malice if an employer has knowledge of facts or intentionally disregards facts that create a high probability of injury or acts with intentional disregard.

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**CHAIRMAN MCKENNEY** said he would allow thirty minutes for proponents and opponents each to speak, and after that time period was up they were to line up and merely state their name.

**Proponents' Testimony:**

**Mr. Alke** said workmen's compensation was a no-fault remedy, with an exclusive remedy rule. He noted the key word in the bill is "intentional injury." The Court reversed 30 years of case law, he said in the Sherner decision. He said the determination of "intentional and act of malice" is in the eyes of the beholder. He said this has made a gigantic difference in the law, and will have to be determined by a jury, case by case, if this bill is not passed. He said the effect of Sherner is that every workplace accident could result in punitive damages to the employer. He said employers are exposed by this case to a new liability which they cannot even insure. He noted the bill will not affect Sherner or the Libby Vermiculite miners, and will only apply after the effective date.

**Mr. Brown** said this is a workmen's compensation balance issue. He said it is the desire of employers to have safe places for their employees to work. He stated the employee should be able to sue if there is the intent to harm, and this is still in the bill.

**Mr. Jones** said the bill will restore fairness and compromise. He presented written testimony. **EXHIBIT (buh58a03)**

**Mr. Johnson** said if there was only one bill he could testify on this session this would be the one. When surveyed his members had been asked what were they most afraid of, and the #1 answer was the "fear of being sued." He said most of his members do not have \$20,000 to spend to prove they are right.

**Mr. Brown** said his company provides day care, health, dental and vision insurance, and has an active safety program. Their policy, he said, is that no job is worth being injured for. He noted that good employees are difficult to find and hard to train, and his company does not want to lose them. "The only protection we have is exclusive remedy," he said, "don't take that away."

**Mr. Bradford** said his company was founded by his grandfather and has 25 employees. He said safety is a major concern, but accidents do happen. "Without SB323, we are wide open," he said, "the litigious climate in the country is scary." He also noted this was an uninsurable risk and without SB323 he would have to close his business and move to another state. He asked them to pass this bill for "old businesses and new businesses."

**Mr. Thiel** said he was highly offended to have it intimated that he did not care about his employees. He said, "I attend the same church, know their families, and work on safety issues all the time." He said he had been in business for 45 years and he could not continue with this kind of risk. Insurance companies have told him they have no coverage for this risk.

**Ms. Reed** said this bill will help overcome the unpredictability of business. She said it will encourage business to stay here and do business.

**Mr. Griffin** said it was imperative for businesses like his to have an exclusive remedy.

**Mr. Mockler** presented written testimony. **EXHIBIT (buh58a04)**

**Mr. Montalban** said he represented 70 small businesses, noting that large businesses could litigate these issues for eternity. He said that the oil and gas business is dangerous. "I have lost a finger on a drilling rig and I was there when a young man died on one," he said. He said, "We have to stick with exclusive remedy, otherwise the only ones who win are the trial lawyers," he said.

**Ms. Lenmark** said the Sherner decision captured national attention and was not just a Montana issue. She said insurance companies in all 50 states worry about this because insurance is not available for intentional acts. She said this disrupts the normal administration of workmen's compensation laws.

**Ms. Abercrombie** said Montana needs to keep the exclusive remedy provision.

**Mr. Brooks** urged support and presented written testimony. **EXHIBIT (buh58a05)**

Also appearing in support of SB323 were **Brad Griffin, Steve Turkowicz, Patrick Heffernan, Cary Hegrebert, Nancy Schlepp, Nancy Butler, Ray Barnicot, Mary Ellen, Christi Blazer, Spook Stang, George Wood, and Aidan Myhre.**

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**Opponents' Testimony:**

**Mr. Thusen** agreed with the proponents when they said responsible business people need protection so they can act without fear. However, he said, irresponsible people have to be told what to do. He said they are like "weeds and flowers." He told about a

case which he handled. The worker called his wife the night before and said that he didn't want to do what he was going to be asked to do the next day and he feared he would die doing it, but he had to feed his family. He knew he would be asked to go into a dirt trench with walls which had not been properly shored or sloped on a site which had received numerous OSHA violations and a series of fines "as long as your arm." On the next day he entered the trench, the dirt caved in on him and he was buried alive. His wife asked a lawyer to take the case and he wouldn't because he said the employer had to have "intent" to have killed her husband. This was before the Sherner decision, he said, and if this bill passed the law would return to that. He said in an effort to get a good contract, bids are lowered, corners are cut, and a good contract turns into a bad one. He said all businesses which are responsible will have proper scaffolding, trench walls and caution with toxic chemicals. However, he said there are businesses which have a "callous disregard for human life." He said the charge of the legislature is that they "shall" protect workers, not "may." He presented written testimony and two photographs. **EXHIBIT (buh58a06) EXHIBIT (buh58a07) EXHIBIT (buh58a08)**

**Mr. Judge** said this bill would be redefine to "unless an intentional or deliberate" act in order to sue and this would be an impossible standard to meet, even for murder committed during a bank robbery. He said the Montana Safety Culture Act was a joke.

**Mr. Logan** said Sherner was a friend of his who was earning \$40-50,000 at Conoco when he was disabled. He was offered \$500 per month and a person could not live on that.

**{Tape : 4; Side : A; Approx. Time Counter : 0}**

**Mr. Smith** said Mr. Sherner couldn't be there today because he was taking medical tests that the defendants had requested. He explained that Sherner had lost motor and speech skills. He said he wished the committee could see him. He presented copies of the Montana Code, a quote from the Sherner case and an excerpt from SB323. **EXHIBIT (buh58a09)** He presented testimony from a lawyer in the W.R. Grace case. **EXHIBIT (buh58a10)** He said the Sherner case has been passed for over a year and asked where is the deluge of lawsuits which everyone has predicted. He said lawyers will not risk a case of they know they cannot win. He told the committee they will wonder why they ever voted yes on this bill.

**Questions from Committee Members and Responses:**

**CHAIRMAN MCKENNEY** advised the committee to stay on the subject of this bill and not to drift off.

**REP. LAIBLE** asked **Mr. Alke** how he would respond to the charge this bill would affect the W.R. Grace case. **Mr. Alke** said to the committee what they were told was not true. He stated this bill only applies to injuries received after passage. He said the Lockwood decision is specific with W.R. Grace, and this bill has nothing to do with the Montana Occupational Disability Act.

*{Tape : 4; Side : A; Approx. Time Counter : 13}*

**REP. WHITAKER** asked **Mr. Brown** if the trench had nine violations why it hadn't been shut down. **Mr. Brown** said he was surprised to hear those figures since OSHA has a tremendous power. He said he was surprised the fines were so low, and that they should have started at \$2500 and double every time thereafter.

**REP. MUSGROVE** asked **Mr. Judge** what he thought about the proponents' statement this will bring back a balance of fairness and compromise. **Mr. Judge** said that in terms of this bill there was no balance. He said they were referring to a combination of workmen's compensation benefits and they could spend hours discussing these benefits or the lack thereof.

**REP. MUSGROVE** asked **Mr. Smith** if amendments would make this a better bill. **Mr. Smith** replied they should "just kill the bill."

**REP. MUSGROVE** said he saw a lot of proponents for the employers and only a few workers, and asked where were they. **Mr. Smith** said, "Most employees don't know when they are going to be hurt."

**REP. BROWN** said to **Mr. Alke** there are 10 sides to every story, and asked him if he was familiar with **Mr. Thusen**. **Mr. Alke** said this was a good example of how trial lawyers work. He explained that **Mr. Thusen** sued the project owner and the engineer and received a \$1.5-2 million settlement.

**REP. GALLIK** said **Mr. Alke** testified that malice was in the eyes of the beholder, what did the code say. **Mr. Alke** said in a jury trial, the lawyer instructs the jury so they could get an instruction of malice. In the jury room they do what they want, he said. The Sherner case says an action can be maintained merely by alleging an intentional act.

**REP. BITNEY** asked **Mr. Alke** about the backhoe case. **Mr. Alke** said the fact that bad things were done there is not a justification for exposing every business in Montana to civil suit. **REP. BITNEY** agreed that life itself could be dangerous.

Closing by Sponsor:

**SEN. MCNUTT** closed by saying when he started his presentation he had begun by saying this was not about workmen's compensation. This bill puts the law back the way it was prior to the Sherner decision, he said. He pointed out there are 13-20 cases pending now, even though there was testimony there were none. He also said there are a lot of cases settled out of court and there is no way to track those. "The most valued thing our employers have are employees," he said, "and we don't want them injured." He said he provided safety glasses and safety shoes for his workers. He added that when he saw a worker with his safety glasses in his toolbox instead of on his face, he was not very polite about it.

**ADJOURNMENT**

Adjournment: 11:45 A.M.

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REP. JOE MCKENNEY, Chairman

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JANE NOFSINGER, Secretary

JM/JN

**EXHIBIT** (buh58aad)